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No. 81-2005

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1981

THERESE BALLET LYNN,
Cross-Petitioner,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Cross-Respondent.

On Cross-Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI

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CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR CERTIORARI

Cross-Respondent, The Regents of the University of California (hereafter "University"), respectfully requests that this Court deny the Cross-Petition for Writ of Certiorari seeking review of the Ninth Circuit's opinion in this case, reported at 656 F.2d 1337, on the basis that all significant issues are raised on the University's petition seeking review of that same opinion.

REASONS WHY THE WRIT SHOULD BE DENIED AS TO THE CROSS-PETITION AND WHY IT OFFERS NO GROUNDS FOR DENIAL OF THE UNIVERSITY'S PETITION

1. The First Question Presented by the Cross-Petition Is Already Raised by the University's Petition

On March 26, 1982, the University filed a Petition for Writ of Certiorari seeking review of the important, unsettled question of whether a university being sued by a plaintiff denied tenure can assert a qualified evidentiary privilege to protect the identities of academic peers submitting confidential evaluations of the quality of the plaintiff's work. (*Regents of the University of California v. Therese Ballet Lynn*, No. 81-1962.) Respondent Lynn raised no opposition to the granting of certiorari on the University's petition. Instead, she filed this Cross-Petition for Writ of Certiorari raising as a first issue the same question presented by the University's petition although making a number of arguments against an evidentiary privilege. There was no need for the cross-petition as respondent is "entitled under our precedents to urge any grounds which would lend support to the judgment below. . . ." (*Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977).) Thus, the first question presented by the cross-petition amounts to no more than support for this Court's review of the issue raised by the University's original petition.

2. The Second Question Presented Is Settled Contrary to Cross-Petitioner

The second issue presented by the cross-petition claims that the Court of Appeals improperly remanded the case and should have ordered judgment entered in Lynn's favor. The basis for the Ninth Circuit's reversal and remand was that the trial court had made supposedly inappropriate rulings on the evidence, including denying plaintiff access to her complete file. Where such improper rulings are made, the appropriate remedy on appeal is to instruct the trial court as to the proper legal standard and to remand. *East v. Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Jackson v. U.S. Steel Corp.*, 624 F.2d 436 (3rd Cir. 1980). Moreover, the University did not produce the confidential documents because the trial court found they were privileged. And judgment against the University because of its refusal to produce them would be contrary to the rule that a party is not to be prejudiced by the assertion of a privilege. (See, e.g., *United States v. Tapia-Lopez*, 521 F.2d 582 (9th Cir. 1975).) Thus, the cross-petitioner's second question was properly decided by the Court of Appeals and raises no issue requiring the exercise of this Court's supervisory powers.

3. The Facts Stated in the Cross-Petition Are Not Grounds for Denying the University's Petition

While Lynn's cross-petition raises the question of whether a qualified privilege arises generally, her "Statement of the Case" focuses on assertions that confidentiality was used to shield improprieties in this particular case.

These assertions may suggest that this is not an appropriate case to resolve the more general legal issue, but they distort the record:

(a) Lynn states that Professor Nicole Marzac, the author of a minority report opposing the negative conclusions of an ad hoc faculty committee charged with reviewing Lynn's scholarship, gave weighty and uncontradicted testimony as to allegedly sexist remarks in committee deliberations. In fact:

(1) Professor Harry Colin Slim, a member of the ad hoc committee, and a veteran of other ad hoc committees, testified that there was nothing unusual about the tenure review of Professor Lynn, and that Professor Marzac was incorrect in her characterization of what happened in the committee deliberations. (R.T. 378-81.)

(2) Professor Carol Whalen, a female member of the ad hoc committee and a veteran of other ad hoc committees, testified that Professor Lynn was treated no differently in the ad hoc evaluation than other candidates undergoing tenure review. (R.T. 231.)

(3) Professor Grover Stephens, the Chair of the faculty Committee on Privilege and Tenure, which evaluated Professor Lynn's complaints of discrimination and which had access to all participants in the review process and to the complete contents of her academic personnel file, testified that after a full investigation the committee determined that Professor Lynn's complaints of sexism were unfounded. (R.T. 577-582; Ex. 19 and 28.)

(4) Professor Marzac's testimony confirmed that she earlier had to be disciplined for another breach of faculty ethics, that of making prior disclosure of the contents of an examination to one of her students. (Marzac deposition, Ex. ...., p. 69.)

(b) Lynn also suggests that another faculty member at the Irvine campus, Professor Laborde, was coerced into not testifying by threats of reprisal under the University's rules of confidentiality. In fact:

(1) Professor Laborde testified at some length at the trial (R.T. 418-39) and even expressed her opinion that Professor Lynn should have been granted tenure. (R.T. 433.)

(2) In response to Professor Laborde's request for immunity from University discipline should she reveal the confidential deliberations of her department, the Court was informed by University counsel that the Irvine campus did have a disciplinary system to enforce the Faculty Code of Ethics and that Professor Laborde's testimony could possibly subject her to that process. (R.T. 431.)

(3) The Court then advised Professor Laborde that she might have a good defense based on Title VII to any disciplinary action, but that she would have to make the decision of whether or not to breach the University's ethical rules. (R.T. 433.)

(4) No objection to her testimony was made by University counsel, no evidentiary ruling was made, and no offer of proof was made by plaintiff's counsel

as to what, if any, testimony Professor Laborde would give were she to breach confidentiality.

(5) Professor Laborde did not leave the stand, but continued to testify including giving testimony as to the substantive content of her minority report. (R.T. 433-438.)

CONCLUSION

For these reasons, the Cross-Petition for a Writ of Certiorari should be denied. We urge this Court to act favorably on the University's petition.

Respectfully submitted,

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